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## Dolan v. City of Tigard: Rough Proportionality as the Supreme Court's Next Step in Takings Jurisprudence

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# DOLAN V. CITY OF TIGARD: ROUGH PROPORTIONALITY AS THE SUPREME COURT'S NEXT STEP IN TAKINGS JURISPRUDENCE

## INTRODUCTION

The federal government and its state counterparts can control land use directly by acquiring an interest in land through the exercise of the power of eminent domain.<sup>1</sup> Eminent domain is commonly defined as government's power to "take" property for public use without the owner's consent.<sup>2</sup> The right of government to exercise its power of eminent domain is universally accepted as an inherent power and a necessary attribute of sovereignty.<sup>3</sup> Alternatively, state governments can control land use by enacting regulations under the "police power."<sup>4</sup>

The federal government's ability to regulate land use is derived from enumerated grants of power under the United States Constitution.<sup>5</sup> Its ability to exercise the power of eminent domain and thereby regulate land use is circumscribed by the Fifth Amendment to the United States Constitution, which states that Congress shall not take "private property . . . for public use, without just compensation."<sup>6</sup>

Similarly, the states are empowered to regulate land use as an incident of the powers reserved to them under the Tenth Amendment to the United States Constitution.<sup>7</sup> The states' ability to invoke the power of eminent domain and to regulate land use is limited, like the federal government's, by the Fifth Amendment.<sup>8</sup> Though on its face the Fifth Amendment does not

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1. *Kohl v. United States*, 91 U.S. 367, 371 (1875); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

2. *Kohl*, 91 U.S. at 371.

3. *Id.* at 371-72.

4. See, e.g., *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 390-95 (1926); *Pennsylvania Coal*, 260 U.S. at 413.

5. U.S. CONST. art. I, § 8.

6. U.S. CONST. amend. V.

7. The complete text of the Amendment states that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

8. See *Chicago, Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226 (1897). Referring to the states' ability to invoke the power of eminent domain, courts

reach the states, it is settled constitutional doctrine that the Amendment's restrictions upon the power of eminent domain are applicable to the states by virtue of the Due Process Clause of the Fourteenth Amendment.<sup>9</sup> Due Process under the Fourteenth Amendment requires that "[no] State shall . . . deprive any person of life, liberty, or property, without due process of law."<sup>10</sup>

Typically, states delegate the power to regulate land use to local governmental bodies under enabling statutes.<sup>11</sup> Exercise of this power, by either the state or those local governmental entities to which the power has been delegated through the establishment of a comprehensive zoning plan, is an exercise of the state's police power.<sup>12</sup> Though there are some semantic

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have referred to incorporation of the Fifth Amendment's takings clause into the Fourteenth Amendment's Due Process Clause. An example of the incorporation rationale is found in *Hawaii Housing Auth. v. Midkiff*, in which the Court stated:

The Fifth Amendment of the United States Constitution provides, in pertinent part, that "private property [shall not] be taken for public use, without just compensation." These cases present the question whether the Public Use Clause of that Amendment, made applicable to the States through the Fourteenth Amendment, prohibits the State . . . from taking . . . .

467 U.S. 229, 231 (1984) (alteration in original). *Chicago, Burlington & Quincy R.R. Co. v. City of Chicago*, on the other hand, does not employ the incorporation rationale that the Fifth Amendment is applied to the states through the Due Process Clause of the Fourteenth Amendment. 166 U.S. 226 (1897). Rather, the Court in that case reasoned that whenever private property is taken for public use, just compensation is a requirement of substantive due process. *Id.* at 241. As for the current state of the law regarding the application of the Fifth Amendment's takings clause to the states, it is unclear whether courts employ the incorporation rationale or whether the Fourteenth Amendment's Due Process Clause is given identical meaning to that of the Fifth Amendment. See generally ROGER A. CUNNINGHAM ET. AL., *THE LAW OF PROPERTY* § 9.1, at 506 & n.3 (2d ed. 1993); JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* § 11.6 (4th ed. 1991).

9. See *Chicago, Burlington & Quincy R.R. Co.*, 166 U.S. at 241 (holding that "whereby private property is taken for the State or under its direction for public use, without compensation . . . to the owner, . . . due process of law required by the Fourteenth Amendment of the Constitution of the United States [is wanting]").

10. U.S. CONST. amend. XIV, § 1.

11. The origin of state enabling legislation is traced to the 1916 New York City Building Zone Resolution, which later served as the basis for a general zoning enabling act enacted by the New York Legislature for application to cities within the state. See generally ROGER A. CUNNINGHAM ET. AL., *supra* note 8, § 9.3. This legislation served as a paradigm for new state enabling statutes until 1923, when the United States Department of Commerce published its draft Standard State Zoning Enabling Act. *Id.* The Standard Act was revised in 1924 and 1926 and formed the basis for most state enabling statutes enacted after 1923. *Id.* By 1926, forty-three of the forty-eight states had adopted some form of enabling legislation. *Id.* Today all fifty states have adopted enabling legislation; many states have adopted the Standard Act while others have adopted modified versions of the Standard Act. *Id.*

12. *Id.* The Standard Act requires that zoning regulations be made in accordance

differences in the definition that courts have given this power,<sup>13</sup> the definition articulated by the United States Supreme Court in *Village of Euclid v. Ambler Realty Co.*<sup>14</sup> is widely recognized. In *Euclid*, the Court stated that the police power is the government's power to regulate human conduct to promote "public health, safety, morals, or general welfare."<sup>15</sup>

During the history of the Supreme Court's oversight of the states' regulation of land use through the police power, its "takings" jurisprudence has remained murky and ill defined.<sup>16</sup> This pervasive uncertainty is principally a result of the Court's inability to articulate a consistent and workable standard to gauge the validity of police power regulations challenged under the Fourteenth Amendment.<sup>17</sup>

*Dolan v. City of Tigard*<sup>18</sup> is the Supreme Court's latest foray into this unsettled area of the law. This Comment examines the relationship of the *Dolan* decision to prior land-use regulation decisions. This Comment further examines whether the decision clarifies or further obfuscates the Court's "takings" jurisprudence. Section I of this Comment briefly reviews the history of the Court's principal takings decisions, while Section II analyzes the issues presented in *Dolan*. Section III offers hypotheses regarding the future applicability of the precepts announced in *Dolan*. Section IV discusses the direction of the Court's takings jurisprudence after the *Dolan* decision and briefly discusses the

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with a comprehensive plan that comports with the requirements of the Standard Act and promotes the health and general welfare of the citizenry. See generally *id.* at 543-44.

13. An example of the variations in semantics is found in the Court's decision in *Hadacheck v. Sebastian*, which stated that the police power referred to the power of the state to regulate to promote the "health and comfort of the community." *Hadacheck v. Sebastian*, 239 U.S. 394, 411 (1915). Similarly, the Court in *Keystone Bituminous Coal Ass'n v. DeBenedictis* defined police power as the power to regulate to "preserv[e] the public weal." 480 U.S. 470, 491 (1987).

14. 272 U.S. 365 (1926).

15. *Id.* at 395 (noting that a zoning ordinance would be an unconstitutional exercise of the police power if its provisions were "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare").

16. Patrick Wiseman, *When the End Justifies the Means: Understanding Takings Jurisprudence in a Legal System With Integrity*, 63 ST. JOHN'S L. REV. 433, 434 nn.1-3 (1988).

17. *Id.*

18. 114 S. Ct. 2309 (1994).

practical effect of the decision upon the future of land-use regulation by the states.

# I. THE HISTORICAL UNDERPINNINGS OF THE SUPREME COURT'S EMINENT DOMAIN JURISPRUDENCE

The history of the Supreme Court's takings jurisprudence is marked by inconsistent results that at times appear irreconcilable in principle.<sup>19</sup> The jurisprudential predicate for the *Dolan* decision can be traced back through this history to some of the Court's early decisions. Of the Court's more recent decisions, *Agins v. City of Tiburon*<sup>20</sup> and *Nollan v. California Coastal Commission*<sup>21</sup> are particularly relevant to the *Dolan* decision.<sup>22</sup>

## A. Development of the Law through *Agins*

In order for a state validly to invoke its police power in regulating land use, the Fourteenth Amendment's substantive due process requirement must be satisfied.<sup>23</sup> Generally, to satisfy this requirement the regulation must seek to achieve a legitimate end and the means employed to achieve that end must be substantially related to the legitimate governmental purpose.<sup>24</sup> In *Lawton v. Steele*,<sup>25</sup> the Supreme Court articulated what is considered the classic test for determining whether the substantive due process requirement has been met:

To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular

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19. A prime example of these inconsistent results is found by contrasting the Court's opinions in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), and *Keystone Bituminous Coal Ass'n. v. DeBenedictis*, 480 U.S. 470 (1987). A comprehensive analysis of the history is beyond the scope of this Comment. However, those decisions which bear upon the *Dolan* framework will be touched upon briefly to give context to the decision.

20. 447 U.S. 255 (1980).

21. 483 U.S. 825 (1987).

22. Arguably, a great number, if not all, of the Court's previous takings decisions ultimately bore upon the *Dolan* decision. This Comment, however, only reaches those decisions which proximately bear upon the *Dolan* reasoning.

23. *Chicago, Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226, 241 (1897).

24. *Wiseman*, *supra* note 16, at 439.

25. 152 U.S. 133 (1894).

class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.<sup>26</sup>

Contrary to the requirements of *Lawton*, the Court in *Hadacheck v. Sebastian*<sup>27</sup> departed from that part of the substantive due process test that conditioned the validity of land-use regulation upon the absence of undue oppression.<sup>28</sup> Accordingly, the Court's opinion in *Hadacheck* is characterized by a resounding approval of the police power as an essential power of government necessary for the progress of the community.<sup>29</sup> In that case, the Court reviewed a Los Angeles ordinance making it unlawful for "any person to establish or operate a brick yard or brick kiln, or any establishment, factory or place for the manufacture or burning of brick within described limits in the city."<sup>30</sup> Despite the fact that the challenged regulation effectively destroyed Hadacheck's business and reduced his property value by over ninety percent,<sup>31</sup> the Court upheld the nuisance regulation as a valid exercise of the State's police power.<sup>32</sup> Because the ordinance sought to regulate a nuisance, the regulated property retained residual value, and Hadacheck was not denied all beneficial use of the property, the Court concluded that the ordinance did not effect a taking.<sup>33</sup>

In contrast to *Hadacheck*, when the Court later considered the validity of Pennsylvania's Kohler Act in *Pennsylvania Coal v. Mahon*,<sup>34</sup> it held that "while property may be regulated to a

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26. *Id.* at 137.

27. 239 U.S. 394 (1915).

28. *Id.* at 409-12.

29. *Id.* at 410. The Court embraced the police power, stating:

[W]e are dealing with one of the most essential powers of government, one that is the least limitable. It may, indeed, seem harsh in its exercise, usually is on some individual, but the imperative necessity for its existence precludes any limitation upon it when not exerted arbitrarily. A vested interest cannot be asserted against it because of conditions once obtaining. To so hold would preclude development and fix a city forever in its primitive conditions. There must be progress, and if in its march private interests are in the way they must yield to the good of the community.

*Id.* (citations omitted).

30. *Id.* at 404.

31. *Id.* at 405.

32. *Id.* at 409-10.

33. *Id.* at 411-12.

34. 260 U.S. 393 (1922).

certain extent, if regulation goes too far it will be recognized as a taking."<sup>35</sup> The Act under consideration in *Mahon* prohibited coal mining in certain areas so as to prevent subsidence of the surface in inhabited areas.<sup>36</sup> Finding that the statute made it "commercially impracticable to mine certain coal,"<sup>37</sup> the Court struck down the statute, noting that the regulation "very nearly [had] the same effect for constitutional purposes as appropriating or destroying [the coal]."<sup>38</sup>

The Court later applied the "too far" test in *Penn Central Transportation Co. v. City of New York*.<sup>39</sup> There, it analyzed whether the New York City Landmarks Preservation Law effected a taking by prohibiting redevelopment of the Grand Central Terminal building.<sup>40</sup> In concluding that the Landmarks Preservation Law did not go "too far," the Court found that it was a valid exercise of the police power because the owners of the regulated site were not solely burdened, but enjoyed a reciprocal advantage.<sup>41</sup> The Landmarks Preservation Law also allowed the owners beneficial use of the property and did not destroy the owners' "distinct investment backed expectations" in the property.<sup>42</sup>

The reasoning in *Penn Central* was later employed by the Court in *Agins v. City of Tiburon*.<sup>43</sup> There, the petitioner brought suit seeking damages for inverse condemnation,<sup>44</sup>

35. *Id.* at 415.

36. *Id.* at 412.

37. *Id.* at 414.

38. *Id.*

39. 438 U.S. 104 (1978).

40. *Id.* at 107.

41. *Id.* at 134-35. The Court noted that the landowners are both burdened and benefited by the statute. *Id.* The law applies to numerous other individual landmarks in and around the city, the preservation of which benefits all state citizens by generally improving the quality of life. *Id.* Similarly, in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, the Court described reciprocity of advantage stating that "[u]nder our system of government, one of the State's primary ways of preserving the public weal is restricting the uses individuals can make of their property. While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others." 480 U.S. 470, 491 (1987) (citation and footnote omitted).

42. *Penn Central*, 438 U.S. at 136.

43. 447 U.S. 255 (1980).

44. Inverse condemnation is defined as "[a]n action brought by a property owner seeking just compensation for land taken for a public use, against a government or private entity having the power of eminent domain. It is a remedy . . . where it appears that the taker of the property does not intend to bring eminent domain

alleging that a zoning ordinance had effected a taking without just compensation in violation of the Fifth and Fourteenth Amendments.<sup>45</sup> In affirming the lower court's decision sustaining a demurrer to the original complaint,<sup>46</sup> the Court announced a two-part test that focused on the owner's beneficial use of the land and investment expectations.<sup>47</sup> The Court stated that "[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests or denies an owner economically viable use of his land."<sup>48</sup>

The Court attributed the first prong of the test<sup>49</sup> to its decision in *Nectow v. Cambridge*.<sup>50</sup> In *Nectow*, the Court found that a residential classification placed on a particular tract of land denied the landowner substantive due process because the ordinance did not promote "the health, safety, convenience and general welfare of the inhabitants of the part of the city affected [by the classification]."<sup>51</sup> Thus, no legitimate state interest was advanced by the ordinance.<sup>52</sup>

The second prong of the test<sup>53</sup> is derived from the Court's opinion in *Penn Central*.<sup>54</sup> Because of the factual setting of *Dolan* and practical considerations that are set forth below, this part of the *Agins* model for takings analysis is not implicated in the *Dolan* decision. Accordingly, only the first prong of the *Agins* model is relevant to the *Dolan* analysis.

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proceedings." BLACK'S LAW DICTIONARY 825 (6th ed. 1990) (citation omitted). In *Agins*, the Court described inverse condemnation as "a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted." 447 U.S. at 258 n.2 (citing *United States v. Clarke*, 445 U.S. 253, 257 (1980)).

45. *Agins*, 447 U.S. at 258.

46. *Id.* at 263.

47. *Id.* at 260.

48. *Id.* (citations omitted).

49. *Id.*

50. 277 U.S. 183 (1928).

51. *Id.* at 188.

52. *Id.* at 188-89.

53. *Agins*, 447 U.S. at 260.

54. *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 138 n.36 (1978).



B. Nollan: *Precursor of Dolan*

The *Agins* model was the basis of the Court's reasoning in *Nollan v. California Coastal Commission*.<sup>55</sup> Moreover, *Nollan* is the jurisprudential predicate for the *Dolan* decision. Like *Dolan*, *Nollan* is an "exactions" case.<sup>56</sup> In *Nollan*, the California Coastal Commission (Coastal Commission) granted the Nollans a building permit in exchange for an easement that traversed the Nollans' beachfront.<sup>57</sup> To determine whether the development exactions constituted a taking without just compensation, the Court sought to determine "the standards for . . . what constitutes a 'legitimate state interest' [and] what type of connection between the regulation and the state interest satisfies the requirement that the former 'substantially advance' the latter."<sup>58</sup> Accordingly, the Court focused on that part of the *Agins* test requiring that land-use regulations substantially advance a legitimate state interest.<sup>59</sup>

The Coastal Commission demanded an easement permitting public passage between two public beaches that existed on either side of the Nollans' property.<sup>60</sup> The State argued that the legitimate state purpose advanced by this exaction was the alleviation of the psychological barrier, created by the Nollans' new home and the existing homes, which prevented the public from realizing that a shoreline existed that it could visit.<sup>61</sup> Moreover, the wall of homes within which the Nollans' home would exist would "increase private use of the shorefront . . . [and would] . . . cumulatively 'burden the public's ability to traverse to and along the shorefront.'"<sup>62</sup>

To reach its conclusion, the Court employed a two-part analysis.<sup>63</sup> First, the Court considered whether the required exaction would be constitutional if enacted independently as a land-use regulation rather than required in exchange for a

55. 483 U.S. 825 (1987).

56. "Exactions" refers to the concessions zoning commissions exact from variance applicants in exchange for granting the requested variance.

57. *Id.* at 828.

58. *Id.* at 834.

59. *Id.* at 834-40.

60. *Id.* at 828.

61. *Id.* at 828-29, 838.

62. *Id.* at 829.

63. *Id.* at 831, 834.

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building permit.<sup>64</sup> If the permit exaction would be constitutional if enacted as an independent exercise of the police power, it should also be constitutional when enforced as a development exaction.<sup>65</sup>

However, when the exaction is viewed independently and is found to effect an uncompensated taking, the second stage of the analysis is conducted.<sup>66</sup> The Court reasoned that even if an imposed development exaction would be unconstitutional if it were enacted independently as a taking without just compensation, the fact that the exaction is imposed in exchange for a building permit may change its character so that it no longer effects a taking.<sup>67</sup> Here, the Court found that an exaction may be justified as a valid land-use regulation if it is necessary to offset the development's impact upon the community.<sup>68</sup> At this point within the analysis, the *Agins* test is implicated. Stated in terms of *Agins*, to be constitutional the exaction must substantially advance a legitimate state interest while acting to mitigate the development's impact.<sup>69</sup>

Applying this test to the facts of *Nollan*, the Court noted that the right to exclude is an essential property right and that permanent physical occupation of property by government constitutes a taking to the extent of the occupation.<sup>70</sup> The Court found that the easement demanded by the Coastal Commission was such a permanent physical occupation and, if enacted independent of the Nollans' request to develop, would constitute a taking requiring just compensation.<sup>71</sup> Thus, the Court unequivocally disposed of the first element of the analysis, stating:

Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the

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64. *Id.* at 831.

65. See Nicholas V. Morosoff, " 'Take' My Beach Please!": *Nollan v. California Coastal Commission and a Rational-Nexus Constitutional Analysis of Development Exactions*, 69 B.U. L. REV. 823, 823-24 (1989).

66. *Nollan*, 483 U.S. at 834.

67. *Id.*

68. *Id.* at 836-37.

69. *Id.* at 834-35.

70. *Id.* at 831 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982)).

71. *Id.* at 832.

beach, rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking.<sup>72</sup>

To determine whether the second part of the analysis had been met, the Court considered whether a sufficient nexus existed between the impact upon the community created by the development and the effect of the exactions in alleviating that impact.<sup>73</sup> Here, the Coastal Commission argued that "a permit condition that serves the same legitimate police-power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking."<sup>74</sup> The Court agreed with the basic premise of the Coastal Commission's argument.<sup>75</sup> However, it stated that the requirements of the Fourteenth Amendment were not fulfilled unless an "essential nexus" existed between the easement exaction and the state interest to be protected.<sup>76</sup>

The Court was unable to conceptualize how a lateral easement along the Nollans' beachfront would serve the state's interest in both surmounting the psychological barrier to access to the beach from the street and reducing beach congestion created by the homes fronting the beach.<sup>77</sup> Consequently, the Court concluded that the required essential nexus was lacking.<sup>78</sup> In the Court's

72. *Id.* at 831.

73. *Id.* at 836-37.

74. *Id.* at 836. The Court also stated:

[t]he Commission unquestionably would be able to deny the Nollans their permit outright if their new house (alone, or by reason of the cumulative impact produced in conjunction with other construction) would substantially impede [the legitimate state purpose sought to be protected by the denial], unless the denial would interfere so drastically with the Nollans' use of their property as to constitute a taking.

*Id.* at 835-36 (footnote omitted) (citing *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978)).

75. *Id.* at 836.

76. *Id.* at 837. When a condition is attached to the provision of a building permit in lieu of denying the permit altogether, the Court found that "[t]he evident constitutional propriety disappears . . . if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition." *Id.* Moreover, the Court added that "unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but an 'out-and-out plan of extortion.'" *Id.* (quoting *J.E.D. Assoc., Inc. v. Atkinson*, 432 A.2d 12, 14-15 (N.H. 1981)).

77. *Id.* at 838-39.

78. *Id.* at 838-39.

view, the condition imposed by the Coastal Commission “[did] not meet even the most untailored standards.”<sup>79</sup>

By leaving these standards undefined, the Court left open the question of how the requirements of the Fourteenth Amendment could be satisfied under the *Agins* test. More precisely, although the Court stated that an essential nexus must exist, the degree to which a permit exaction must relate to the legitimate state interest remained an unanswered question. This is the issue the Court confronted in *Dolan v. City of Tigard*.<sup>80</sup>

## II. THE SUPREME COURT'S DECISION IN *DOLAN V. CITY OF TIGARD*

In *Dolan*, the owner of a commercial enterprise applied for a building permit to improve existing commercial property.<sup>81</sup> The planned improvements included demolition of the existing structures, the addition of new buildings, and the addition of a paved parking lot.<sup>82</sup> Pursuant to Tigard's Community Development Code (CDC)<sup>83</sup> and its Master Drainage Plan (MDP),<sup>84</sup> the City's Planning Commission (Planning Commission) approved Dolan's permit application conditioned upon several land exactions.<sup>85</sup> The conditions required Dolan to

79. *Id.* at 838.

80. 114 S. Ct. 2309 (1994).

81. *Id.* at 2313.

82. *Id.* at 2313-14.

83. Tigard's Community Development Code (CDC) was enacted in response to the State of Oregon's comprehensive land-use management program, Or. Rev. Stat. §§ 197.005-860 (1991). *Id.* at 2313. The program required all cities and counties within the State to develop comprehensive land-use programs consistent with the State's planning goals. *Id.* The CDC required Central Business District property owners, such as Dolan, to dedicate 15% of their property area to open space and landscaping. *Id.* Accordingly, impervious surfaces such as buildings and parking lots were limited to the remaining 85% of the property area. *Id.* Moreover, to alleviate traffic congestion in the Central Business District, the CDC required that new developments facilitate a city-adopted pedestrian-bicycle pathway plan by devoting land for the pathways pursuant to the plan. *Id.*

84. Dolan's property was located adjacent to Fanno Creek. *Id.* The Master Drainage Plan (MDP), which is incorporated in the CDC, identified those sections of the creek adjacent to Dolan's property as susceptible to flooding and suggested that the creek basin be improved by dredging, that building be excluded from the flood plain, and that the flood plain be preserved as greenways. *Id.* To accomplish these improvements, the MDP provided that the cost of improvements would be shared and apportioned based upon whether a property owner directly or indirectly benefited from the MDP. *Id.* Direct benefit recipients, those property owners along the regulated waterways, would be required to bear more cost. *Id.*

85. *Id.* at 2314.

transfer title to both property within the flood plain of the adjacent Fanno Creek and property that was dedicated to pathways under the pedestrian-bicycle pathway plan to the City.<sup>86</sup>

Dolan's request for variances from the requirements of the CDC were denied by the Planning Commission,<sup>87</sup> and Dolan appealed to the Land Use Board of Appeals (the Board).<sup>88</sup> On appeal, Dolan alleged that the land exactions were not related to the proposed development and, thus, constituted an uncompensated taking in derogation of the Fifth Amendment.<sup>89</sup> The Board found that a "reasonable relationship" existed between the land exactions demanded by the Planning Commission and the impact of the property improvements proposed by Dolan.<sup>90</sup> On that basis, the Board denied the appeal.<sup>91</sup>

Dolan appealed to the Oregon Court of Appeals, arguing that the Board improperly relied upon the reasonable relationship test and that the essential nexus test of *Nollan* was the controlling criterion for takings analysis.<sup>92</sup> The Court of Appeals rejected this argument and affirmed the Board's findings.<sup>93</sup> The Oregon Supreme Court affirmed,<sup>94</sup> finding that the Court in *Nollan* held that an "exaction is reasonably related to an impact if the exaction serves the same purpose that a denial of the permit would serve."<sup>95</sup> Ultimately, the court found that the exactions imposed as a condition to the permit were reasonably related to the impact of Dolan's development.<sup>96</sup>

The United States Supreme Court granted certiorari on two bases. First, the Court sought to reconcile the conflict between the Oregon Supreme Court's application of a reasonable

86. *Id.* The land exactions included all of Dolan's property that lay within the one hundred year flood plain of Fanno Creek, the purpose of which was to alleviate flooding that would be exacerbated by the impervious surfaces added to Dolan's property by the improvements. *Id.* To accommodate the pedestrian-bicycle pathway systems, the exactions included a fifteen-foot strip of land that abutted the flood plain. *Id.*

87. *Id.*

88. *Id.* at 2315.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Dolan v. City of Tigard*, 832 P.2d 853 (Or. Ct. App. 1992).

93. *Dolan*, 114 S. Ct. at 2315.

94. *Dolan v. City of Tigard*, 854 P.2d 437 (Or. 1993).

95. *Id.* at 443.

96. *Id.*

relationship test and the Court's decision in *Nollan v. California Coastal Commission*.<sup>97</sup> Second, the Court considered the question left open in its *Nollan* decision, that of "the required degree of connection between the exactions [imposed by the city] and the projected impact of the proposed development."<sup>98</sup>

In *Dolan*, the Court employed the two-tiered analysis applied in the *Nollan* decision and in its prior cases involving permit conditions. Moreover, the Court again applied the *Agins* test<sup>99</sup> to determine whether the land-use regulation in question constituted a taking without just compensation.<sup>100</sup> Under the first step in that analysis, the Court concluded that "[w]ithout question, had the city simply required petitioner to dedicate a strip of land along Fanno Creek for public use, rather than conditioning the grant of her permit to redevelop her property on such a dedication, a taking would have occurred."<sup>101</sup>

The finding that the exaction would effect a taking if enacted as an independent land-use regulation triggered the second prong of the *Nollan* analysis, requiring the Court to determine whether the required contribution was necessary to offset impacts upon the community created by the proposed development.<sup>102</sup> In terms of the *Agins* takings standard, the inquiry is whether the exactions substantially advance a legitimate state interest.<sup>103</sup> In *Dolan*, the City of Tigard argued that the state interests were the prevention of flooding along Fanno Creek and the reduction of traffic congestion in the Central Business District.<sup>104</sup>

Under its *Nollan* analysis, the Court found that an essential nexus existed between these state interests and the permit

97. *Dolan*, 114 S. Ct. at 2315-16 (citing *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987)).

98. *Id.* at 2317.

99. *Id.* at 2316. The Court articulated the test as follows: "[a] land use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land.'" *Id.* (alterations in original) (quoting *Agins v. Tiburon*, 447 U.S. 255, 260 (1980)).

100. *Id.*

101. *Id.* (citing *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831 (1987)).

102. *Id.* at 2316-17. The thrust of *Dolan's* argument was to challenge the findings made by the City to support the exactions it demanded in exchange for the permit approval. *Id.* at 2317. Specifically, *Dolan* argued "that the city has identified 'no special benefits' conferred on her, and has not identified any 'special quantifiable burdens' created by her new store that would justify the particular dedications required from her which are not required from the public at large." *Id.*

103. *Id.* at 2316-17.

104. *Id.* at 2317-18.

conditions imposed by the City.<sup>105</sup> The Court then examined whether “the degree of the exactions demanded by the city’s permit conditions bear the required relationship to the projected impact of petitioner’s proposed development.”<sup>106</sup> To establish the applicable standard, the Court reviewed state court precedent.<sup>107</sup>

Based on its review, the Court decided that an intermediate level of scrutiny, a “reasonable relationship” between dedication and impact, would apply to the review of conditions imposed on building permits.<sup>108</sup> The Court endorsed the following state court definition in support of its conclusion:

The distinction, therefore, which must be made between an appropriate exercise of the police power and an improper exercise of eminent domain is whether the requirement has some reasonable relationship or nexus to the use to which the property is being made or is merely being used as an excuse for taking property simply because at that particular moment the landowner is asking the city for some license or permit.<sup>109</sup>

On this basis, the Court adopted “rough proportionality” as the measure of the required nexus between the exactions imposed by government and the projected impacts of the proposed development.<sup>110</sup> Rough proportionality is defined as having “[n]o precise mathematical calculation . . . , but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.”<sup>111</sup>

In applying the law to the facts of the case, the Court reversed the Oregon Supreme Court’s decision.<sup>112</sup> Regarding the required

105. *Id.* at 2318.

106. *Id.*

107. *Id.* at 2318-19. In its review the Court considered, but rejected, standards requiring “very generalized statements as to the necessary connection between the required dedication and the proposed development,” and in the alternative, the “‘specifi[c] and uniquely attributable’ test” that requires exacting correspondence between the exactions and the burdens produced by the development. *Id.* (alteration in original) (quoting *Pioneer Trust & Sav. Bank v. Mount Prospect*, 176 N.E.2d 799, 802 (Ill. 1961)).

108. *Id.* at 2319.

109. *Id.* (citing *Simpson v. North Platte*, 292 N.W.2d 297, 301 (Neb. 1980)).

110. *Id.*

111. *Id.* at 2319-20.

112. *Id.* at 2322.

title transfer involving the Fanno Creek flood plain property, the Court recognized that keeping the flood plain undeveloped would alleviate the increased storm water flow from Dolan's proposed development.<sup>113</sup> But in requiring transfer of title to the City instead of simply prohibiting development in the flood plain, the City exceeded the scope of a permissible exaction.<sup>114</sup> Specifically, the City was unable to sufficiently relate the acquisition of the flood plain property for public use within its greenway system to the legitimate state interest of flood prevention.<sup>115</sup> Moreover, the City's demand that the flood plain property be public rather than private eliminated the landowner's right to exclude.<sup>116</sup>

Regarding the pedestrian-bicycle pathway, the Court noted that the development of a larger retail operation by Dolan would likely increase traffic congestion in the Central Business District.<sup>117</sup> The City's effort to quantify the congestion contributed by Dolan's development failed to demonstrate a reasonable relationship between the additional congestion generated by the development and the required pathway dedication.<sup>118</sup> Thus, the pathway dedication condition failed to meet the requirements of rough proportionality even though it acted to substantially advance a legitimate state interest.<sup>119</sup>

### III. THE FUTURE APPLICABILITY OF THE *DOLAN* DECISION

The *Dolan* analysis closely tracks the analysis employed by the Court in *Nollan*, such that the cases cannot be considered in isolation; rather, they must be considered as part of the same line of reasoning. In response to the *Nollan* decision, some commentators suggested that the precepts of *Nollan* may have broad implications by foreshadowing a heightened level of scrutiny to be applied in future takings cases.<sup>120</sup> For example,

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113. *Id.* at 2320-21.

114. *Id.*

115. *Id.*

116. *Id.* at 2320 (citing *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979), for the proposition that the right to exclude is "one of the most essential sticks in the bundle of rights that are commonly characterized as property").

117. *Id.* at 2321-22.

118. *Id.* In this regard, the City simply found that "the pathway 'could offset some of the traffic demand . . . and lessen the increase in traffic congestion.'" *Id.*

119. *Id.*

120. Nathaniel S. Lawrence, *Means, Motives, and Takings: The Nexus Test of Nollan*



Nathaniel Lawrence found that the majority in *Nollan* gave the appearance of “applying a deferential standard of review, while in fact it was engaging in a demanding form of scrutiny.”<sup>121</sup> Moreover, Lawrence suggests that the reasoning employed in *Nollan* is driven by an “intuition . . . that property is in some sense a ‘fundamental right’ in America’s sociopolitical landscape, if not its constitutional jurisprudence.”<sup>122</sup>

As additional evidence of heightened scrutiny, Lawrence argues that *Nollan* breathes new life into *Agins*.<sup>123</sup> Specifically, he notes that other Court decisions have “recited this phrase; none, however, ha[ve] used it to justify second-guessing the wisdom of legislative or administrative decisions.”<sup>124</sup> In essence, Lawrence reads *Nollan* as indicative of the Court’s movement away from ad hoc balancing and toward a reliance on a substantive due process analysis of takings challenges that is not deferential to legislative judgment.<sup>125</sup>

Other commentators take a narrower view. Frank Michelman, for example, finds that the *Nollan* reasoning is circumscribed by *Loretto*, which held that a regulation that creates a permanent physical occupation by government is a per se taking.<sup>126</sup> He argues that

*Nollan* holds that when state regulatory action imposes permanent physical occupation conditionally rather than unconditionally, the aggrieved owner can challenge state regulatory action “as” a “taking,” and thereby obtain a certain form of intensified judicial scrutiny of the condition’s instrumental merit or urgency. There is no clear basis to be found in the opinion for concluding that the Court in *Nollan* decided or meant to decide anything beyond just that.<sup>127</sup>

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*v. California Coastal Commission*, 12 HARV. ENVTL. L. REV. 231, 242 (1988) (noting that “the majority opinion was fraught with indications that heightened scrutiny is appropriate for some class of takings claims . . . [and] it would be myopic to focus doggedly on the case’s narrow holding”).

121. *Id.*

122. *Id.* at 245.

123. *Id.*

124. *Id.*

125. See Steven J. Lemon et al., Comment, *The First Applications of the Nollan Nexus Test: Observations and Comments*, 13 HARV. ENVTL. L. REV. 585 (1989).

126. See Frank Michelman, *Takings*, 1987, 88 COLUM. L. REV. 1600, 1608 (1988).

127. *Id.* Michelman did acknowledge that two features of the *Nollan* opinion militated against this narrow reading. *Id.* at 1609. First, the Court did not reach its conclusion on the basis of a permanent physical occupation, but rather invoked “a more generally applicable, intensified scrutiny” of the connection between the exaction

Whether *Nollan* ultimately has broad implications or, alternatively, is circumscribed within the *Loretto* framework or is otherwise limited, *Dolan* was not the case under which broader implications or a narrower interpretation would be manifested. This is due primarily to the analogous factual settings presented by both cases. In essence, *Dolan* did not present the opportunity to substantially modify or affirm current Court policy in the broader universe of takings jurisprudence beyond the context of development exactions.

*Dolan* did, however, afford the Court the opportunity to complete *Nollan*'s analytical framework and to limit its application. *Dolan* initially employs the two-step analysis articulated in *Nollan* and augments it by the requirement of rough proportionality.<sup>128</sup> Under the first step of the analysis, the exaction is examined as if it were enacted as an independent land-use regulation.<sup>129</sup> If under these conditions a taking is found, the *Agins* test is employed as a second stage of analysis to determine whether the exaction in question ultimately effects a taking.<sup>130</sup>

Though it is not entirely clear from the decisions how the *Agins* test is integrated within the *Nollan* and *Dolan* analyses, a plausible synthesis follows. As was first articulated by the Court in *Nollan*, if an exaction would be constitutional if enacted independently as a land-use regulation as opposed to a permit requirement, it would also be constitutional when enforced as a development exaction.<sup>131</sup> Conceivably, under this part of the analysis, land-use regulations would be scrutinized under the *Loretto* test for permanent physical occupations permitted by

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and the legitimate state purpose. *Id.* Second, the Court intimated that it was prepared to allow a "permanent physical occupation if satisfied that such an imposition would avoid or requite some interference with the regulator's public objectives threatened or caused by the regulated owner's activity." *Id.* at 1610. Michelman dismissed these features as dispositive evidence portending broad heightened judicial scrutiny on the grounds that those aspects of the opinion amounted to a divergence by the Court to assure that the claimed nexus was palpable and was not an attempt to take private property for public use "by subterfuge." *Id.* at 1612. Thus, the heightened scrutiny of the *Nollan* reasoning is limited to those occasions when "a permanent physical occupation [is imposed] on an owner who prefers otherwise and whose specific actions cannot justly be deemed to have waived or forfeited that preference." *Id.* (footnote omitted).

128. *Dolan v. City of Tigard*, 114 S. Ct. 2309, 2319-20 (1994).

129. *Id.* at 2316.

130. *Id.*

131. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 836 (1987).

government,<sup>132</sup> the “too far” test articulated in both *Pennsylvania Coal* and *Penn Central*, and the *Lucas v. South Carolina Coastal Council*<sup>133</sup> nuisance regulation precepts. Thus, absent the finding of a taking under these tests, the analysis is at an end.

If, however, a taking is found to occur under the first prong of the analysis, the *Agins* test is implicated. But, because the test incorporates the *Penn Central* “destruction of economically viable use” standard, the inquiry under *Agins* will likely be whether the regulation substantially advances a legitimate state interest. This is so because a regulation that is found to destroy all economically viable use of property such that it is considered a taking under the first stage of the analysis will also be considered a taking under the second stage of the analysis. Thus, a court will only consider the economic viability prong when the regulation permits a permanent physical occupation of the landowner’s property and advances a legitimate state interest, but the landowner alleges that the regulation destroys all economically viable use of the land.

When the analysis is conducted under *Agins* to determine whether the exaction substantially advances a legitimate state interest, the essential nexus requirement of *Nollan* is subsumed by the rough proportionality test of *Dolan*.<sup>134</sup> That is, under rough proportionality, the “required dedication [must be] related both in nature and extent to the impact of the proposed development.”<sup>135</sup>

Beyond the legal similarities, these cases are also factually analogous. Both cases involve development exactions required by local government agencies in response to applications for permits to improve particular tracts of land.<sup>136</sup> The question then becomes whether the reasoning of *Nollan* and *Dolan* will be

132. The Court in *Nollan* found that, under the *Loretto* rule, the requirement of an easement across the Nollans’ property was a permanent physical occupation by the government. *Id.* at 832. Therefore, if enacted independently, the permit exaction would constitute a taking. *Id.*

133. 112 S. Ct. 2886 (1992).

134. Though the Court initially articulated the analysis as a having separate steps for both the “essential nexus” and “rough proportionality” components, in the end, the rough proportionality test incorporates the essential nexus requirement by requiring that the exaction be related in “nature.” *Dolan*, 114 S. Ct. at 2319-20.

135. *Id.* at 2319-20.

136. *Id.* at 2313-15; *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 827-30 (1992).

employed beyond the narrowly confined factual settings under which these cases were decided. Specifically, the question becomes whether the two-step *Nollan* analysis, as augmented by the concept of rough proportionality, will be applied to challenges of generally applicable land-use regulations that are alleged to have effected a taking.

Though the opinions are not explicit concerning breadth of applicability, there are several significant indicators. The strongest of these is the form of the analysis itself. When the Court in *Nollan* initiated the second stage of the analysis, it noted that because "requiring uncompensated conveyance of the easement outright would violate the Fourteenth Amendment, the question becomes whether requiring it to be conveyed as a condition for issuing a land-use permit alters the outcome."<sup>137</sup>

On a textual basis, the application of the analysis would appear to be limited to the context of land-use permits. However, even if the textual framework is to be rejected as unduly limiting and regarded as merely an example of an otherwise broadly applicable framework, it is hard to conceive of a circumstance involving generally applicable land-use regulations in which the two-step analysis would be applied. Given the Court's prior takings jurisprudence, with the possible exception of *Lucas v. South Carolina Coastal Council*,<sup>138</sup> when land-use regulations are found to have effected a taking a landowner is due just compensation. There is no secondary analysis, after a taking has been found, that provides an alternative constitutional justification for the regulation.

Moreover, since the second stage of the analysis serves the express purpose of justifying an otherwise unconstitutional

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137. *Nollan*, 483 U.S. at 834.

138. 112 S. Ct. 2886 (1992). In *Lucas*, the Court noted that background principles of the state's law of property and nuisance presented a pre-existing limitation on the landowner's title. *Id.* at 2900. Thus,

[a]ny limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.

*Id.*

taking, the analysis appears specifically tailored for scrutiny of permit conditions, to the exclusion of the analysis of generally applicable land-use regulations. This conclusion is supported by the argument the Court formulated in *Nollan* to justify the constitutionality of an exaction that was otherwise a per se taking under the *Loretto* rationale.<sup>139</sup> In *Nollan*, the Court reasoned that when a condition that would otherwise be considered a taking is imposed upon a building permit and is viewed independently of the impacts produced by the corresponding development, the government's power to forbid development in order to protect a legitimate state interest

must surely include the power to condition construction upon some concession by the owner, even a concession of property rights, that serves the same end. If a prohibition designed to accomplish that purpose would be a legitimate exercise of the police power rather than a taking, it would be strange to conclude that providing the owner an alternative to that prohibition which accomplishes the same purpose is not.<sup>140</sup>

Further, *Dolan* makes two distinctions that portend limited application. First, in dismissing Dolan's argument that the permit condition denied her economically beneficial use of the property, the Court distinguished the *Lucas*, *Kaiser Aetna*, and *Penn Central* decisions.<sup>141</sup> It noted that the land-use regulations reviewed in those cases differed from the development exaction at issue in *Dolan*. Specifically, those cases "involved essentially legislative determinations classifying entire areas of the city, whereas here the city made an adjudicative decision to condition

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139. In dictum, the Court opined that the permit exaction imposed upon the Nollans "would be constitutional even if it consisted of the requirement that the Nollans provide a viewing spot on their property for passersby with whose sighting of the ocean their new house would interfere." *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 836 (1992). However, under *Loretto*, "when the 'character of the government action' is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434-35 (1982) (citation omitted). Thus, the Court found the exaction constitutional notwithstanding that the viewing spot would be a permanent occupation by government and would destroy the Nollans' right to exclude. *Nollan*, 483 U.S. at 836.

140. *Nollan*, 483 U.S. at 836-37. Though the assertion is arguably dictum, it nevertheless appears to limit the application of this analysis to cases involving development exactions.

141. *Dolan v. City of Tigard*, 114 S. Ct 2309, 2316 & n.6 (1994).

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[Dolan's] application for a building permit on an individual parcel."<sup>142</sup>

Second, in noting that the burden of proof properly falls on the City to show that the exaction is not an arbitrary regulation of property rights, the Court again made the distinction between "generally applicable zoning regulations" and "adjudicative decisions" made by the City requiring the conditional issuance of Dolan's building permit.<sup>143</sup>

The import of these distinctions is that they would be unnecessary if the *Dolan* analysis were not limited to exactions challenges arising out of adjudicative decisions by municipalities.<sup>144</sup> Rather, the permit exaction would be constitutionally evaluated just as a generally applicable land-use regulation would be.

The shift in the burden of proof is particularly compelling. Prior to *Dolan*, the party challenging the constitutionality of generally applicable land-use regulations as being arbitrary carried the burden of proof.<sup>145</sup> However, the Court's distinction in *Dolan* requires that the governmental body prove the constitutionality of its action.<sup>146</sup>

Thus, it appears that the analysis employed by the Court in *Nollan* and *Dolan* to evaluate the constitutional validity of development exactions will have application solely within that sphere of takings controversies. Whether these decisions will influence decisions outside this narrowly defined sphere remains an open question. Though this conclusion may not be supportable on the force of any one of the foregoing points, taken in the aggregate they provide a compelling rationale for believing that

142. *Id.* at 2316.

143. *Id.* at 2320 n.8.

144. *Id.* The Court in *Dolan* also noted that the *Nollan* decision held "that governmental authority to exact . . . [development] condition[s] was circumscribed by the Fifth and Fourteenth Amendments." *Id.* at 2317. Taken in conjunction with the foregoing distinction, this assertion strengthens the presumption of limited applicability of development exactions challenges.

145. *See, e.g., Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (requiring the party challenging the constitutional validity of a generally applicable zoning ordinance to bear the burden of proof in showing arbitrary operation of the regulation upon property rights). The validity of the shift is apparent when it is recalled that at this stage of the analysis it is acknowledged that the regulation in question, when viewed independently, effects a taking.

146. *Dolan*, 114 S. Ct. at 2320 n.8.

the Court intends to limit the application of the *Nollan* and *Dolan* analyses.

#### IV. *DOLAN* CONTINUES THE PROPERTY-PROTECTIVE JURISPRUDENCE OF THE COURT

Like the *Nollan* decision, *Dolan* can be read to allow zoning commissions and appeals boards to take property for public use without just compensation.<sup>147</sup> However, in light of the realities of modern urban development, the decision allows for governmental flexibility<sup>148</sup> while advancing the Court's current property-protective movement.<sup>149</sup>

The property-protective bent of the Court is reflected in the rough proportionality test because more than a simple essential nexus or logical relationship is required if the exaction in question is to pass constitutional muster. Rough proportionality

147. For example, this may occur when a landowner seeks a permit to improve property and the government seeks an exaction in exchange for the permit even though the improvements meet all zoning requirements. If the zoning board can conceive of some impact upon the public interest that derives from the improvements, even though all generally applicable land-use regulations are met, the board can condition the permit grant upon concessions of property rights in order to minimize those impacts. This is the case as long as the requirements of rough proportionality are met, even though the required concessions would be a taking if achieved through general land-use regulation or an exercise of eminent domain.

148. This flexibility is reflected in the Court's comment in *Nollan*. See *supra* note 141 and accompanying text. This reasoning is of dubious constitutional validity; that is, nowhere in the Constitution or even in the Court's takings cases is it stated that government can take property for public use without just compensation as long as it advances a legitimate state interest, although that is precisely what the *Nollan* and *Dolan* decisions seem to suggest. However, the rationale behind granting zoning commissions and landowners an alternative to rejecting permit applications has undeniable functional logic.

149. *Dolan* seems to complete the application of heightened scrutiny the Court sought to invoke in *Nollan*. Moreover, the decision fits with other decisions, such as *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, that have continued a movement toward protection of property owners' rights. 482 U.S. 304 (1987). In *First English*, the Court held that "where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." *Id.* at 321. Stated another way, the *Dolan* decision continues the Court's movement away from decisions like *Penn Central* and *Keystone Bituminous Coal*. In those cases, the Court refused to conceptually sever the regulated property from the unregulated property and found, when the property was considered as a whole, that the challenged regulation did not destroy the land owner's beneficial use of the property. Therefore, the land owner was not entitled to redress. See *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 501 (1987).

presents a higher threshold for government to surmount to effect development exactions. Such exactions must bear some relation in "both nature and extent" to the impact of the proposed development.<sup>150</sup> Consequently, government is not given carte blanche to extort exactions in the public interest just because a landowner happens to be seeking a permit to develop.

The shift of the burden of proof is also indicative of the Court's property-protective movement.<sup>151</sup> Here, instead of maintaining the status quo of its previous takings jurisprudence and forcing the party challenging the regulation to bear the burden of proof, the Court has legitimately shifted the burden to the government to justify its action.<sup>152</sup> By no longer granting government the presumptive validity of its development exactions, the Court has moved toward protecting property rights.

### CONCLUSION

In all, the *Dolan* decision adds very little to the body of takings decisions. Other than deciding the degree of connection required between a development exaction and the state interest the exaction is purported to protect, *Dolan* plows no new ground in terms of takings jurisprudence. Its contribution of the requirement of rough proportionality completes *Nollan*'s analytical framework. Possibly its most significant contribution to the universe of takings jurisprudence is that *Dolan* continues the Court's movement toward providing property owners greater protection from the arbitrary actions of government. Further, the decision appears to limit the applicability of the *Nollan-Dolan* analytical framework to development exactions.

In terms of its practical effects, the *Dolan* decision, when taken together with its counterpart *Nollan*, creates a disincentive to development and may negatively affect property owners' ability to acquire development permits. Though the decision provides government the flexibility to substitute an exaction for a permit denial, if the exaction would serve the same purpose as an outright denial,<sup>153</sup> the requirement of rough proportionality creates a disincentive for government to exercise that flexibility.

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150. *Dolan v. City of Tigard*, 114 S. Ct 2309, 2320 (1994).

151. *Id.* at 2320 n.8.

152. *Id.*

153. The purpose to be served is to advance a legitimate state interest. See *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 836-37 (1992).



Specifically, governments will likely be unwilling to bear the burden of complying with the requirement of rough proportionality and will instead tend to deny development permits.<sup>154</sup> Given such a denial, the government can expect landowners seeking to develop to negotiate with the government and volunteer property rights concessions that would mitigate any negative impacts the development might have upon essential state interests.

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154. In *Nollan*, the Court stated that the government always has the option of denying the permit if the proposed development would negatively impact essential state interests, except when the denial would so interfere with the landowner's use of the property that the denial effects a taking. *Id.* at 834.